No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, APPELLANT

v.

McKESSON & ROBBINS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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1. In its motion to affirm, the appellee ("McKesson") does not dispute the important character of the questions presented on this appeal. Indeed, McKesson itself emphasizes—perhaps unduly—that these questions have "possible far-reaching economic and social consequences". (Motion to Affirm, p. 4). McKesson urges, however, that "this particular record does not present an adequate occasion for this Court to consider and determine [these] questions. . . . " (Motion to Affirm, p. 4). In an apparent effort to avoid the seemingly plain language of this Court in the

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Schwegmann case,[1] McKesson contends that, "On the specific record in this case, there was shown to be no substantial competition on the same functional level between McKesson and any of the parties with whom it has made fair trade contracts" (Motion to Affirm, p. 3).

This startling contention has no support in the district court's findings and cannot be reconciled with McKesson's admissions below. For the year ended June 30, 1952, total sales of McKesson's own brand products were $10,422,965. Of this amount, sales to 148 independent wholesalers were approximately $963,000. Nearly 50% of these sales, totalling $483,462, were made to 137 independent wholesalers whose trading areas were substantially identical or materially overlapping with those of McKesson's wholesale divisions.[2] An additional $265,810 in sales was made to 6 independent wholesalers whose trading areas overlapped, but less materially, those of McKesson's wholesale divisions. Thus, out of the 148 independent wholesalers involved, 143 were engaged in competition with McKesson wholesale divisions in the sale of McKesson products to retailers. More-

[1] *Schwegmann Bros.* v. *Calvert Corp.*, 341 U. S. 384, 389: ". . . the Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against 'horizontal' price fixing by those in competition with each other at the same functional level."

[2] Of this amount, sales by the manufacturing division were $283,462 and sales by wholesale divisions were approximately $200,000.

over, twelve of the independent wholesalers—including the five not otherwise in competition with McKesson—served trading areas in which there were located large retailers who made direct purchases from McKesson's manufacturing division.[3]

The substantial nature of the competition involved is even more apparent when considered in terms of the total amount of goods in competition. For this purpose, the amount of McKesson products sold by independent wholesalers in competition with McKesson (*supra*) reveals the scope of only one side of the competition. To this amount must be added the amount of McKesson products sold by McKesson in competition with the independent wholesalers. McKesson's manufacturing division, for example, made sales in the amount of $283,462 to ten independent wholesalers whose trading areas are substantially identical or materially overlapping with seven of McKesson's wholesale divisions. These seven wholesale divisions made sales of McKesson products in the amount of $786,309. Thus, in these trading areas alone, the total amount of goods in competition was approximately a million dollars. This amount represents "an appreciable amount of commerce under any standard" (*United States* v. *Yellow Cab Co.*, 332 U. S. 218, 225–226) and "cannot be said to be insignificant or insubstantial" (*Inter-*

[3] For the year in question, direct sales by the manufacturing division to large retailers amounted to $1,352,521.

national Salt Co. v. *United States*, 332 U. S. 392, 395, 396).

2. Although the case is undoubtedly of wide importance, we doubt that the impact of a decision in favor of the Government will necessarily be as far-reaching as McKesson predicts. In several respects, on the facts of this case, the issue before the Court is a narrow one. The Court, if it wishes, could properly reverse the decision below without even reaching the broader questions which McKesson seeks to interject. Contrary to McKesson's assertion, the Court need not decide whether a manufacturer is a "wholesaler" solely because it sells its own goods to retailers or whether a fair trade contract "between wholesalers" is invalid even in the absence of competition between them. Instead, the central issue before the Court is whether a price-fixing agreement "between persons, firms, or corporations in competition with each other" is exempt from Sherman Act prohibitions *merely because there is a seller-buyer relationship between the parties to the agreement.* Only in the event that this Court sustains such an exemption will it be necessary to pass on the questions raised by the "between

wholesalers" clauses of the Miller-Tydings and McGuire Acts.[4]

McKesson is also in error in imputing to the Government the "bald contention that a manufacturer of brand named merchandise necessarily loses his right to statutory fair trade protection if he himself participates in any degree as a wholesaler in the distribution of his own products. . . ." (Motion to Affirm, p. 3). The Government makes no such contention. Except in those states where fair trade is not permitted, drug retailers are bound, either by contract or non-signer provisions, to sell McKesson products only at the prices fixed by McKesson. Such use of fair trade is not challenged here (except possibly insofar as a temporary suspension may be necessary for the purpose of dissipating the effects of the charged antitrust violation). McKesson and such retailers are not "persons, firms, or corporations in competition with each other." What the Government does challenge, however, is McKesson's use of fair trade to bind independent wholesalers who, unlike the retailers, are engaged in

[4] In this connection it may be noted that McKesson is not in the position of a manufacturer that merely distributes its own goods. The company is admittedly the largest drug wholesaler in the United States. For the fiscal year ended March 31, 1954, the sales of all drug products by McKesson's wholesale drug divisions amounted to $338,000,000.

competition with McKesson.[5] No other issue is before the Court. In order that this issue may be resolved, probable jurisdiction should be noted.

Respectfully submitted.

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[5] McKesson appears to contend that the provisos to the Miller-Tydings and McGuire Acts merely prohibit agreements "fixing the prices at which *two or more* competitive products are to be sold" (Motion to Affirm, p. 6). [Italics theirs.] Without attempting a detailed answer at this preliminary stage, we would point out that this very contention was made in the court below but was not accepted. The court instead rested its decision on far narrower grounds. The same contention, moreover, was expressly rejected by the Federal Trade Commission in *Eastman Kodak Company*, 3 CCH Trade Reg. Rep. (10th ed.), par. 25,291, on which McKesson relies. And see *United States* v. *Masonite Corp.*, 316 U. S. 265, 279–280.